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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-863

MICHAEL LEO FIORELLA, A. RICHARD FIORELLA, CLIFFORD CARLL, JOHN PORCELLO, ANTHONY PIZZUTELLI, ANGELO ALFANO, ALFRED RIVOLI, JAMES COMUNALE,

Petitioners,

VS.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS REPLY BRIEF

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Rochester, New York 14614,
(716) 325-2110.

February, 1973.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Although the Solicitor General has urged that the Court grant the petitions in *Becker* v. *United States,* No. 72-158[1] and *Pisacano* v. *United States,* No. 71-1410, where the issues are identical to those here, he has resisted a grant of certiorari in this case. Consequently, this reply is necessitated to show that the circumstances contained in this petition compel a grant of certiorari even more than in *Becker* and *Pisacano.*

[1] Counsel here is the attorney for Richard Becker and Jack Eisen in Petition No. 72-158.

The government opposes a grant of our petition i
case because it claims Mr. Mitchell personally app
the wiretap application. But that is not so. In th
trict court the government offered a memo fro
Mitchell to Mr. Wilson, which clearly authorized
Wilson to make the determination of probable caus
that memo, dated March 1, 1971, Mr. Mitchell sai

> "Pursuant to the powers conferred on me by S
> 2516 of Title 18, United States Code, you are
> specifically designated to exercise those powe
> the purpose of authorizing H. Kenneth Schroed
> to make the above described application." (R. 1

Exercising the authority delegated to him b
Mitchell, Will Wilson in a letter to the United
Attorney for the Western District of New York s
part:

> "I have reviewed your request and the facts a
> cumstances and have determined that probable
> exists to believe that [the persons named in the
> . . . are commiting . . . [certain offenses].
> further determined that there exists probable
> to believe that the above persons make use
> described facility in connection with those offens
> wire communications concerning the offenses
> intercepted, and that normal investigative proc
> reasonably appear to be unlikely to succeed if t
>
> Accordingly, you are hereby authorized und
> power specially delegated to me in this proceed
> the Attorney General of the United State
> Honorable John N. Mitchell, pursuant to the
> conferred on him by Section 2516 of Title 18 .
> make the application to a judge of wiretap or
>
> Sincerely,
>
> /s/ WILL WILSON
> Assistant Attorney Ge

---

[2] Refers to the appendix filed in the United States Court of
for the Second Circuit. We have attached a copy of that
appendix A.

[3] We have attached the entire Will Wilson letter as app

These two documents read together make irresistible the conclusion that the Attorney General delegated to Will Wilson the authority to decide whether there was probable cause to submit the wiretap application to a federal judge. Otherwise, there would have been no need for the Wilson letter and his explicit statements certifying to the United States Attorney in Buffalo that he had reviewed the file and had determined that there was probable cause to make the application.[4]

Since it is conceded Will Wilson never examined the wiretap application and it is obvious Mr. Mitchell never reviewed it, our case comes well within the reach of the government's position in *Becker* and *Pisacano*.[5] In fact, this case is more compelling because there has never been submitted an affidavit from anyone in the Justice Department indicating they examined the application. Whereas in *Becker, Pisacano* and a host of other cases before this Court, a variety of Justice Department officials indicated they had examined the application in those cases and determined there was probable cause.

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[4] In his affidavits supplied to the lower court, Sol Lindenbaum never indicated that he had actually seen Mr. Mitchell personally initial the memorandum to Will Wilson (125, 127). Nor did he suggest that Mr. Mitchell had personally reviewed the application for wiretap authorization in this case. Our case is similiar to *United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), in that it is unclear whether Mr. Mitchell personally authored and initialed the memorandum to Will Wilson. In *Giordano*, after lengthy hearings, the district court ordered suppression of all intercepted telephone communications (340 F.Supp. 1033 [D.Md. 1972].) The Court of Appeals affirmed, observing that:

> ". . . Mr. Lindenbaum not only authored the memorandum of approval, but also penned thereon the Attorney General's initals ('JNM')." (469 F.2d at 525.)

[5] The procedure followed here must have been the same in hundreds of cases where Attorney General Mitchell did not personally review requests but instead passed it on to Mr. Wilson for his consideration.

Since it is obvious that Mr. Mitchell did not r
application and it is conceded Mr. Wilson did
there is nothing else before this Court indicatin
examine the application, the petition for certior
be granted.

Respectfully submitted,

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APPENDIX A

Memorandum of John N. Mitchell

UNITED STATES GOVERNMENT MEMORANDUM
DEPARTMENT OF JUSTICE

DATE: MAR 1 1971
JNM:MMcG:skh

TO: Will Wilson
Assistant Attorney General
Criminal Division

FROM: John N. Mitchell
Attorney General
s/ J. N.M.

SUBJECT: *Interception Order Authorization*

This is with regard to your recommendation that authorization be given to H. Kenneth Schroeder, Jr., United States Attorney in and for the Western District of New York to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a fifteen (15) day period to and from telephone number 716-232-5191, located at 84 Cleveland Street, Rochester, New York, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1955 and 371 by Alfred Rivoli, Michael Fiorella, John Porcello, Clifford Carll, Anthony Pizzutelli, Richard Grock and others as yet unknown.

Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing H. Kenneth Schroeder, Jr. to make the above-described application.

APPENDIX B

Will Wilson's Letter of Authorization

Assistant Attorney General
Criminal Division

DEPARTMENT OF JUSTICE
WASHINGTON 20530

MAR 1 1971

Mr. H. Kenneth Schroeder, Jr.
United States Attorney
Western District of New York
Buffalo, New York

Dear Mr. Schroeder:

This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an Order of the Court authorizing the Federal Bureau of Investigation to intercept wire communications to and from telephone number 716-232-5191, located at 84 Cleveland Street, Rochester, New York, in connection with the investigation into possible violations of Sections 1955 and 371 of Title 18, United States Code, by Alfred Rivoli, Michael Fiorella, John Porcello, Clifford Carll, Anthony Pizzutelli, Richard Grock and others as yet unknown.

I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe that Alfred Rivoli, Michael Fiorella, John Porcello, Clifford Carll, Anthony Pizzutelli, Richard Grock and others as yet unknown have committed, are committing, or are about to commit offenses enumerated in

Will Wilson's Letter of Authorization

Section 2516 of Title 18, United States Code, to wit: viol
tions of Sections 1955 and 371 of Title 18, United Stat
Code. I have further determined that there exists pr
able cause to believe that the above persons make use
the described facility in connection with those offens
that wire communications concerning the offenses will
intercepted, and that normal investigative procedu
reasonably appear to be unlikely to succeed if tried.

Accordingly, you are hereby authorized under the pow
specially delegated to me in this proceeding by
Attorney General of the United States, the Honora
John N. Mitchell, pursuant to the powers conferred on h
by Section 2516 of Title 18, United States Code, to m
application to a judge of competent jurisdiction for
Order of the Court pursuant to Section 2518 of Title
United States Code, authorizing the Federal Bureau
Investigation to intercept wire communications from
facility described above, for a period of fifteen (15) d

Sincerely,

s/ WILL WILSON
Assistant Attorney Gener